

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CENTER FOR FOOD SAFETY,
660 Pennsylvania Ave SE #402
Washington, DC 20003

Plaintiff,

VS.

ENVIRONMENTAL PROTECTION
AGENCY,
1200 Pennsylvania Avenue, N.W.
Washington, DC 20560

Defendant.

Case No. 19-1958

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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I. NATURE OF ACTION

1. The Center for Food Safety (CFS)—a nonprofit public interest and environmental advocacy organization working to protect public health and the environment—brings this civil action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, challenging the U.S. Environmental Protection Agency (EPA)’s unlawful withholding of records concerning legal rulemaking petitions submitted to the EPA in 2017 seeking improved oversight of pesticides.

2. Subsequent to filing those rulemaking petitions, CFS filed a FOIA request with EPA to better understand EPA’s regulatory decisions pertaining to the regulation and pesticide registration generally as related to their subject matter. The goal of the request was to open the operations and activities of government to public scrutiny and contribute significantly to the public’s understanding of the agency’s actions.

3. EPA is violating FOIA by failing to produce records in response to CFS’s FOIA request, failing to conduct an adequate search for responsive records, and by failing to provide both an initial determination as to the scope of the records to be produced or withheld, and an estimated date by which the agency’s search will be complete.

4. EPA’s unlawful withholding of public records undermines FOIA’s basic purpose of government transparency. Because prompt access to these records is necessary to effectuate FOIA’s purpose, CFS seeks declaratory relief establishing that EPA is in violation of FOIA, and injunctive relief directing EPA to provide responsive records without any further delay.

II. JURISDICTION AND VENUE

5. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

6. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which expressly provides a venue for FOIA cases in the District Court of the District of Columbia.

7. Declaratory relief is appropriate under 28 U.S.C. § 2201.

8. Injunctive relief is appropriate under 28 U.S.C. § 2202 and 5 U.S.C. § 552(a)(4)(B).

III. PARTIES

9. Plaintiff CFS is a national 501(c)(3) nonprofit public interest and environmental advocacy organization that empowers people, supports farmers, and protects the environment. CFS is a membership based nonprofit organization with over 970,000 members that works to address the impacts of the food system on public health and the environment. Through nearly two decades of involvement in environmental litigation and policymaking as it relates to food, CFS has demonstrated its ability to take technical information provided by government agencies and distill it into a format that is accessible to the public. CFS employs science and policy experts who have analyzed FOIA, NEPA, FIFRA and other environmental and scientific reports for their entire careers. CFS has long had a flagship program on improving oversight of pesticides. CFS puts out reports and factsheets on pesticides, and other topics that

tend to be difficult for the layperson to understand without professional assistance. CFS has been engaged in ongoing efforts to educate our members and the public about the ongoing harms to pollinators, public health, animal health, and the environment from pesticides, including the toxicity of systemic neonicotinoid pesticides. CFS and its members are harmed by EPA's violations of FOIA, as such violations preclude CFS from gaining a full understanding of the decision-making process regarding the underlying agency actions, and prevent CFS from disseminating information to the public concerning EPA's evaluation, approval, and labeling of pesticides.

10. Defendant EPA is an agency within the Executive Branch of the United States Government. EPA is in possession and control of the records that CFS seeks, and is an agency within the meaning of 5 U.S.C. § 552(f)(1). EPA is therefore subject to FOIA.

IV. LEGAL BACKGROUND

11. The basic purpose of FOIA is to promote government transparency and public oversight of agency action. The statute effectuates this objective by establishing the public's right to access all federal agency records unless such records may be withheld pursuant to one of nine, narrowly construed exemptions. 5 U.S.C. § 552(b)(1)-(9).

12. FOIA imposes stringent deadlines on federal agencies with regard to making initial determinations in response to FOIA requests. Within twenty working days of receiving a FOIA request, an agency must determine whether it will release the requested records, and must notify the requester of its determination, the reasons for its decision, and the requester's right to appeal an adverse decision to the head of the agency. *Id.* § 552(a)(6)(A).

13. Congress has specified certain limited instances in which federal agencies may extend this twenty-working-day deadline. First, an agency may toll the deadline to seek additional information or clarification from a requester, but that tolling period ends when the agency receives such information or clarification. *Id.* § 552(a)(6)(A)(ii). Second, in “unusual circumstances” an agency may extend the deadline no more than ten additional working days by providing written notice to the requester that sets forth the circumstances justifying the extension. *Id.* § 552(a)(6)(B)(i).

14. FOIA requires that a determination under 5 U.S.C. § 552(a)(6)(A) “must be more than just an initial statement that the agency will generally comply with a FOIA request and will produce non-exempt documents and claim exemptions in the future.” *Citizens for Responsibility and Ethics in Washington v. Fed. Election Comm’n*, 711 F.3d 180, 188 (D.C. Cir. 2013).

15. For a determination to trigger the administrative exhaustion requirement, the agency must at least “(i) gather and review the documents; (ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the ‘determination’ is adverse.” *Id.* at 188.

16. If the agency fails to respond within the applicable time limit, the requester “shall be deemed to have exhausted his administrative remedies.” 5 U.S.C. § 552(a)(6)(C)(i).

17. Such constructive exhaustion¹ “allows immediate recourse to the courts to compel the agency’s response to a FOIA request.” *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 62, 64 (D.C. Cir. 1990).

18. The court “then has the authority to oversee and supervise the agency’s progress in responding to the request.” *Seavey v. DOJ*, Case No. 15–1303, 2017 WL 3112816, at *2 (D.D.C. July 20, 2017) (citing *Citizens for Responsibility and Ethics in Washington*, 711 F.3d at 189); *see also Clemente v. FBI*, 71 F. Supp. 3d 262, 269 (D.D.C. 2014) (a court “may use its equitable powers to require the agency to process documents according to a court-imposed timeline.”).

19. FOIA requires each agency to search for records in a manner that is reasonably calculated to locate all records that are responsive to the FOIA request. 5 U.S.C. § 552(a)(3)(C)-(D).

20. With regard to production of responsive records, “FOIA requires that the agency make the records ‘promptly available,’ which depending on the circumstances typically would mean within days or a few weeks of a ‘determination,’ not months or years.” *Citizens for Responsibility and Ethics in Washington*, 711 F.3d at 188 (citing 5 U.S.C. § 552(a)(3)(A), (a)(6)(C)).

21. In certain limited instances, an agency may withhold records or portions of records pursuant to nine specific exemptions. 5 U.S.C. § 552(b). These exemptions must be “construed narrowly in keeping with FOIA’s presumption in favor of disclosure.” *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 869 (D.C. Cir. 2010).

¹ “Constructive exhaustion is determined by the actions (or lack thereof) an agency has taken by the time a suit is filed in the district court.” *Wisdom v. U.S. Tr. Program*, 232 F. Supp. 3d 97, 113 (D.D.C. 2017) (citing *Oglesby*, 920 F.2d at 64).

22. FOIA places the burden on the agency to prove that it may withhold responsive records or portions of records from a requester. 5 U.S.C. § 552(a)(4)(B).

23. FOIA provides this Court jurisdiction “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” *Id.* § 552(a)(4)(B).

24. In addition, FOIA provides a waiver for fees associated with the procurement of documents subject to FOIA requests. Such fee waivers are granted “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *Id.* § 552(a)(4)(A)(iii).

25. Finally, FOIA requires that the agency provide “information about the status of a request . . . including . . . an estimated date on which the agency will complete action on the request.” *Id.* § 552(a)(7)(B)(ii).

V. FACTUAL BACKGROUND

26. CFS, through its Pesticides Program, works to improve the oversight of pesticides. CFS submitted two legal rulemaking petitions to EPA in 2017 regarding the regulation of pesticides, including neonicotinoids (2017 petitions). The first petition² requests EPA to no longer exclude neonicotinoid-coated seeds from pesticide regulation under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), and instead properly classify and regulate

² Citizen Petition to the U.S. Environmental Protection Agency Seeking Rulemaking or a Formal Agency Interpretation for Plant Seeds Coated with Systemic Pesticides (Submitted on April 26, 2017), https://www.centerforfoodsafety.org/files/2017-04-25_coated-seeds-petition-final-1_33314.pdf.

them as pesticides. The second petition³ requests EPA to revise testing requirements of pesticides prior to registration to include the whole pesticide formulation, not just the active ingredient. To date, EPA has not answered either legal petition. It has held public comment periods on each, in winter 2018/spring 2019.

27. On July 25, 2018, CFS submitted a FOIA request to EPA, seeking “[a]ny and all documents, from April 2017 to present, related to the 2017 petitions” (July 25 FOIA Request). In addition, the July 25 FOIA Request asked that EPA waive all fees in connection with the procurement of this information, because fee waiver criteria was met pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). CFS explained that release of the requested records was in the public’s best interest because disclosure would significantly contribute to public understanding of the operations or activities of government, and because obtaining the information was of no commercial interest to CFS.

28. An initial determination on the July 25 FOIA Request was due by August 22, 2018, twenty working days after the date CFS submitted the request.

29. On August 2, 2018, EPA granted CFS’s fee waiver request in full.

30. On October 15, 2018, CFS sent an email to EPA requesting that the agency provide an initial determination on the scope of the documents responsive to the July 25 FOIA Request, and provide an estimated completion date as required by 5 U.S.C. § 552(a)(7)(B)(ii).

³ Citizen Petition Seeking Revised Testing Requirements of Pesticides Prior to Registration (Submitted on July 10, 2017), https://www.centerforfoodsafety.org/files/2017-7-9-whole-formula-petition-to-epa-final_18181.pdf.

31. Receiving no response from the EPA, CFS forwarded the same email again to EPA on October 25, 2018 renewing their request for an initial determination and an estimated date of completion concerning the July 25 FOIA Request as required by FOIA.

32. As of the date of this complaint, CFS has received no response or further communications from EPA concerning the July 25 FOIA Request.

33. Two hundred and thirty-two working days have passed since EPA received the July 25 FOIA Request, yet EPA has not provided an initial determination in response to the July 25 FOIA Request, supplied an estimated date of completion, or produced any responsive records.

34. None of FOIA's nine exemptions to the statute's disclosure mandate apply to the records that are responsive to the July 25 FOIA Request.

35. CFS has been required to expend resources to prosecute this action.

VI. CAUSES OF ACTION

FIRST CAUSE OF ACTION

Defendant Failed to Comply with FOIA's Mandatory Determination Deadline

36. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

37. EPA violated FOIA by failing to make a determination on CFS's July 25 FOIA Request. 5 U.S.C. § 552(a)(6).

38. CFS has a statutory right to receive a determination within the congressionally mandated deadline of twenty working days. *Id.*

39. To date—two hundred and thirty-two working days after CFS filed the July 25 FOIA Request—EPA has not provided a determination, notwithstanding the requirement

of 5 U.S.C. § 552(a)(6)(A) of an agency response within twenty working days detailing the scope of the records the agency intends to produce and withhold, the reasons for making that determination, and an explanation of the process by which a requester can administratively appeal that determination.

40. EPA's failure to make an initial determination with regard to the July 25 FOIA Request, thus unlawfully delaying its response beyond the deadline that FOIA mandates, has prejudiced CFS's ability to timely obtain public records. *Id.* § 552(a)(6)(A)(i).

41. As such, CFS has exhausted the applicable administrative remedies with respect to the July 25 FOIA Request pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

42. Due to the nature of CFS's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to EPA in the foreseeable future.

43. CFS's organizational activities will be adversely affected if EPA continues to violate FOIA by failing to disclose responsive records as it has in this case.

44. Unless enjoined and made subject to a declaration of CFS's legal rights by this Court, EPA will continue to violate CFS's rights to receive public records under FOIA.

SECOND CAUSE OF ACTION
Defendant Failed to Conduct an Adequate Search for Responsive Records

45. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

46. EPA violated FOIA by failing to conduct an adequate search for responsive records pursuant to 5 U.S.C. § 552(a)(3)(C)-(D).

47. CFS has a statutory right to have EPA process its July 25 FOIA Request in a manner that complies with FOIA. *Id.*

48. EPA violated CFS's right when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to the July 25 FOIA Request, thus prejudicing CFS's ability to timely obtain public records.

49. CFS has exhausted the applicable administrative remedies with respect to the July 25 FOIA Request pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

50. Due to the nature of CFS's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to EPA in the foreseeable future.

51. CFS's organizational activities will be adversely affected if EPA continues to violate FOIA by failing to disclose responsive records as it has in this case.

52. Unless enjoined and made subject to a declaration of CFS's legal rights by this Court, EPA will continue to violate CFS's rights to receive public records under FOIA.

THIRD CAUSE OF ACTION
Defendant Unlawfully Withheld All Responsive Records

53. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

54. EPA violated FOIA by failing to promptly disclose records that are responsive to CFS's July 25 FOIA Request. 5 U.S.C. § 552(a)(4)(B).

55. CFS has a statutory right to the records it seeks, and there are no applicable exemptions under FOIA that provide a legal basis for EPA to withhold these records from CFS. *See id.* § 552(b)(1)-(9).

56. To date, EPA has not provided any records requested by CFS in the July 25 FOIA Request, notwithstanding the requirement of 5 U.S.C. § 552(a)(3)(A) and 5 U.S.C. § 552(a)(6)(C) to make agency records "promptly available."

57. As such, EPA is wrongfully withholding disclosure of information sought by CFS, information to which it is entitled and for which no valid disclosure exemption has been claimed. EPA's unlawful withholding prejudices CFS's ability to timely obtain public records.

58. CFS has exhausted the applicable administrative remedies with respect to the July 25 FOIA Request pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

59. Due to the nature of CFS's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to EPA in the foreseeable future.

60. CFS's organizational activities will be adversely affected if EPA continues to violate FOIA by failing to disclose responsive records as it has in this case.

61. Unless enjoined and made subject to a declaration of CFS's legal rights by this Court, EPA will continue to violate CFS's rights to receive public records under FOIA.

FOURTH CAUSE OF ACTION
Defendant Failed to Provide Reasonably Segregable Portions of Any Lawfully Exempt
Records

62. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

63. EPA violated FOIA by failing to take reasonable steps to segregate and release nonexempt portions of lawfully exempt records in response to the July 25 FOIA Request. 5 U.S.C. § 552(a)(8)(A)(ii)(II).

64. CFS has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. *Id.*

65. To date, EPA has failed to disclose any records to CFS, including nonexempt information that could be reasonably segregated and released in response to the July 25 FOIA Request, thus prejudicing CFS's ability to timely obtain public records.

66. CFS has exhausted the applicable administrative remedies with respect to the July 25 FOIA Request pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

67. Due to the nature of CFS's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to EPA in the foreseeable future.

68. CFS's organizational activities will be adversely affected if EPA continues to violate FOIA by failing to disclose responsive records as it has in this case.

69. Unless enjoined and made subject to a declaration of CFS's legal rights by this Court, EPA will continue to violate CFS's rights to receive public records under FOIA.

FIFTH CAUSE OF ACTION
Defendant Failed to Provide an Estimated Date of Completion as Required by FOIA

70. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

71. EPA violated FOIA by failing to provide CFS with an estimated date of completion as required by 5 U.S.C. § 552(a)(7)(A)-(B).

72. CFS has a statutory right to have EPA process its July 25 FOIA Request in a manner which complies with FOIA. EPA has violated Plaintiff's rights in this regard by its failure to provide—by any means—an estimated completion date for its response to the July 25 FOIA Request as required by FOIA. 5 U.S.C. § 552(a)(7)(A)-(B).

73. EPA's failure to inform CFS of an estimated completion date for the July 25 FOIA Request has prejudiced CFS's ability to timely obtain public records.

74. CFS has exhausted the applicable administrative remedies with respect to the July 25 FOIA Request pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

75. Due to the nature of CFS's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to EPA in the foreseeable future.

76. CFS's organizational activities will be adversely affected if EPA continues to violate FOIA by failing to disclose responsive records as it has in this case.

77. Unless enjoined and made subject to a declaration of CFS's legal rights by this Court, EPA will continue to violate CFS's rights to receive public records under FOIA.

REQUESTS FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Order Defendant to provide a lawful initial determination on Plaintiff's FOIA request as required by FOIA by a date certain;
2. Order Defendant to conduct searches that are reasonably calculated to locate all records responsive to Plaintiff's FOIA Request with the cut-off date for searches being the date the searches are conducted, and to provide to Plaintiff, by a date certain, with all responsive records and reasonably segregable portions of lawfully exempt records sought in this action.
3. Declare that Defendant unlawfully failed to make and communicate an initial determination on Plaintiff's FOIA Request as required by 5 U.S.C. § 552(a)(6)(A)(i).
4. Declare that Defendant unlawfully failed to undertake a search for and disclose of all records responsive to Plaintiff's FOIA Request as required by 5 U.S.C. § 552(a)(6)(A)(i).

5. Declare that Defendant unlawfully failed to provide Plaintiff with reasonably segregable portions of records which may be lawfully subject to a FOIA exemption as required by 5 U.S.C. § 552(a)(7)(b).

6. Declare that Defendant unlawfully failed to provide Plaintiff with an estimated date of completion as to the search and production of documents responsive to Plaintiff's FOIA Request as required by 5 U.S.C. § 552(a)(7)(B)(ii).

7. Provide for expeditious proceedings in this action.

8. Award Plaintiff its costs and reasonable attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E) or 28 U.S.C. § 2412.

9. Grant such other relief as the Court may deem appropriate.

Dated this 28th day of June, 2019.

Respectfully submitted,

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/s/ George A. Kimbrell

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